MALAYSIAN BAR & ANOR.

v.

GOVERNMENT OF MALAYSIA

HIGH COURT MALAYA, KUALA LUMPUR
HARUN HASHIM J
[ORIGINATING SUMMONS NO. A 45 OF 1985]
22 JANUARY 1986

CONSTITUTIONAL LAW: *Article 8(1) of the Federal Constitution - Freedom of equality before the law - Article 10(1)(c) - Freedom of association - Whether s. 46A(1)(a) of the Legal Profession Act 1976 was ultra vires the above Articles of the Federal Constitution - Whether void under Article 4(1) of the Federal Constitution.*

LEGAL PROFESSION: *Validity of s. 46A(1)(a) of the Legal Profession Act 1976.*

The plaintiffs (The Malaysian Bar & V.M.S.V. Radha Madhavan) were seeking declarations to the effect that s. 46A(1)(a) of the Legal Profession Act 1976 ("the Act") as introduced by the Legal Profession (Amendment) Act 1978 is *ultra vires* Article 8(1) and 10(1)(c) of the Federal Constitution ("the Constitution") and therefore void under Article 4(1) of the Constitution. Section 46A made provision for the qualification of membership of the Bar Council or Bar Committee or of any committee of the Bar Council or a Bar Committee. This case arises from that part of s. 46A which disqualifies junior members of the Bar from holding office in the Bar Council and the Committees. The Malaysian Bar has failed to persuade the Government into removing this restriction on junior lawyers holding office in the aforesaid bodies and they henceforth applied to this Court for the above declarations.

Held:

[1] It is common ground that a law is bad if it is discriminatory, unreasonable and if there is no nexus between the law and the objects of the amending Act. The principles of classification and constitutionality under Article 8 of the Constitution have been exhaustively dealt with by the Federal Court in *Datuk Haji Harun bin Haji Idris v. Public Prosecutor* [1977] 2 MLJ 155 at 165 per Suffian LP.

[2] Applying the above principles and looking at the object of the section, the provisions (sub-section 46A(1)(b) and (c)) applied to all lawyers and were therefore not discriminatory.

[3] The powers and functions of the Bar Council and State Bar Committees as provided by the Act must clearly be exercised by senior members of the profession and disqualification of membership of these bodies by junior members is not unreasonable.

[4] However the words "any committee of the Bar Council or a Bar Committee" in s. 46A were unreasonable for reasons set out in detail in the judgment.

[5] Consequently, the doctrine of severability was applied to the words "or of any committee of the Bar Council or a Bar Committee" in s. 46A(1) of the Act in so far as it affects para. (a) thereof is *ultra vires* Article 8(1) and is therefore void under Article 4(1) of the Constitution but the remaining provisions are not *ultra vires* or void under the Constitution.

[6] The question of freedom of association in Article 10(1)(c) of the Constitution did not arise because s. 46A did not prevent a lawyer from being a member of the Bar. Article 10(1)(c) does not give any right to any citizen to manage any association but merely the right to form association - see *Azeez Basha v. Union of India* [1968] AIR SC 662 at 675.

[No order as to costs.]

Case(s) referred to:
Datuk Haji Harun bin Haji Idris v. Public Prosecutor [1977] 2 MLJ 155
P.P. v. Khong Teng Khen & Anor. [1976] 2 MLJ 166
Azeez Basha v. Union of India [1968] AIR SC 662

Legislation referred to:
Architects Act 1967, s. 3(1)(d)
Federal Constitution, arts. 4(1), 8(1), 10(1)(c)

For the plaintiffs - Ronald Khoo (C.V. Das with him); M/s. Shook Lin & Bok
For the defendant - Y.B. Tan Sri Abu Talib Othman; (Lim Beng Choon with him)

JUDGMENT

Harun J:

In these proceedings, the plaintiffs seek the following declarations-

(a) That s. 46A(1)(a) of the Legal Profession Act 1976 (Act 166 of 1976) as introduced by the Legal Profession (Amendment) Act 1978 (A419 of 1978) is *ultra vires* Article 8(1) of the Federal Constitution guaranteeing equality before the law and equal protection of the law and therefore void under Article 4(1) of the Federal Constitution.

(b) That s. 46A(1)(a) of the Legal Profession Act 1976 (Act 166 of 1976) as introduced by the Legal Profession (Amendment) Act 1978 (Act A419 of 1978) is *ultra vires* Article 10(1)(c) of the Federal Constitution guaranteeing freedom of association and therefore void under Article 4(1) of the Federal Constitution.

Section 46A of the Legal Profession Act (the Act) provides:

(1) A person shall be disqualified for being a member of the Bar Council or a Bar Committee, or of any committee of the Bar Council or a Bar Committee:

(a) unless he is and has been an advocate and solicitor for a period of not less than seven years, or for periods which in the aggregate amount to not less than seven years; or

(b) if he is a member of either House of Parliament, or of a State Legislative Assembly, or of any local authority; or

(c) if he holds any office in:

(i) any trade union; or

(ii) any political party; or

(iii) any other organisation, body or group of persons whatsoever, whether or not it is established under any law, whether it is in Malaysia or outside Malaysia, which has objectives or carries on activities which can be construed as being political in nature, character or effect, or which is declared by the Attorney General by order published in the *Gazette*, to be an organisation, body or group of persons which has such objectives or carries on such activities.

(2) An order made by the Attorney General under para. (c)(iii) of subsection (1) shall not be reviewed or called in question in any Court.

(3) Where a member of the Bar Council or a Bar Committee, or of any committee of the Bar Council or a Bar Committee, becomes disqualified under subsection (1), he shall immediately thereupon be deemed to have vacated his membership thereof and any office that he may hold therein.

The Section came into effect on 24 January 1978. The Act itself came into force on 1 June 1977 repealing and replacing the Advocates & Solicitors Ordinance, 1947 (the Ordinance). Neither in the Act (before this amendment) nor in the Ordinance was there a provision for disqualification for membership of the aforesaid bodies. In particular, prior to the amendment, advocates & solicitors (lawyers) with less than 7 years standing were eligible and did hold office in the Bar Council, State Bar Committees and in 17 standing committees and other ad hoc committees appointed under s. 58 of the Act. Out of 31 members of the Bar Council, the number of lawyers with less than 7 years standing (junior lawyers) who were elected to the Council prior to the amendment was:

1975 - 7
1976 - 3
1977 - 6
1978 - 1.

As at end of February 1985, there were 1760 practising lawyers and of these, 790 (44.8%) are junior lawyers. The number of new lawyers entering the profession is increasing each year as the following number of Petitions for Admission shows:

1980 - 107
1981 - 112
1982 - 180
1983 - 275
1984 - 313.

Ever since the amendment came into force, the Bar Council has ceaselessly persuaded the Government to remove the restriction on junior lawyers holding office in the Bar Council and committees but without any success. It is said that there is an insufficient number of senior lawyers who have the time to carry out all the duties required of the Bar Council and Committees under the Act. Able and willing junior lawyers are prevented from actively participating in committee work. In any event nearly half the lawyers are not represented in any of the Committees. The Government's answer is that the reason for the amendment is to ensure that only experienced and responsible members of the Bar should be members of the Bar Council and Committees to manage the affairs of the Bar and exercise the powers of the several bodies under the Act. Having exhausted their efforts and patience, the plaintiffs now contend that the amendment (s. 46A(1)(a) of the Act) is *ultra vires* the Federal Constitution.

It is argued that the effect of the amendment is to divide lawyers into classes of junior and senior members of the Bar although -

Under s. 35(1) all lawyers have the exclusive right to appear and plead in all Courts of Justice, and as between themselves shall have the same rights and privileges without differentiation;

Under s. 43 all lawyers are automatically members of the Malaysian Bar;

Under s. 44 all lawyers are eligible to-

(a) attend and vote at any general meeting;

(b) vote on the election of members to the Bar Council;

provided they are not in arrears of the subscriptions.

Under s. 46 all lawyers at present pay the same rate of subscriptions and levies. The only exceptions made are-

Under s. 13, masters must be of 7 years standing - this is understandable because only experienced lawyers can instruct pupils; and

Under s. 99, only lawyers of 7 years standing, may be appointed members of the Disciplinary Committee - again this is understandable to avoid junior members of the Bar sitting in judgment of their seniors; and experience is required to deal with ethics of the profession.

In any event both exceptions were present in the Ordinance. It is therefore submitted that the classification is **discriminatory** under Article 8(1) of the Federal Constitution which provides-

All persons are equal before the law and entitled to equal protection of the law.

It is common ground that a law is bad if it discriminatory, unreasonable and if there is no nexus between the law and objects of the amending Act. The principles of classification and constitutionality under Article 8 of the Federal Constitution have been exhaustively dealt with by the Federal Court in *Datuk Haji Harun bin Haji Idris v. Public Prosecutor* [1977] 2 MLJ 155 where Suffian L.P. (in delivering the judgment of the Court) at p. 165 said:

the first question we should ask is, is the law discriminatory and that the answer should then be - if the law is not discriminatory, if for instance it obviously applies to everybody, it is good law, but if it is discriminatory, then because the prohibition of unequal treatment is not absolute but is either expressly allowed by the constitution or is allowed by judicial interpretation we have to ask the further question, is it allowed? If it is, the law is good, and if it is not, the law is void.

"The principle underlying Article 8 is that a law must operate alike on all persons **under like circumstances** not simply that it must operate alike on all persons in any circumstances, nor that it 'must be general in character and universal in application and that the State is no longer to have the power of distinguishing and classifying persons ... for the purpose of legislation'" per Suffian LP in *PP v. Khong Teng Khen & Anor*. [1976] 2 MLJ 166 FC at p. 170.

Applying the above principle, is s. 46A discriminatory? In the first place, I think, s. 46A read as whole is a provision prescribing the disqualification for membership of the Bar Council and Committees. The object is clearly that the affairs of the Bar be managed by members of the legal profession who are not only professionally independent but appear to the outside world to be so. The emphasis is an independent Bar which is not subject to external influences of a non-professional character. Hence the provision that lawyers who are members of Parliament, or any of the state Legislatures or local authorities; or hold office in any trade unions or political party or organisations of a political nature are disqualified from holding office in the Bar Council or Committees. These provisions (subsection 46A(1)(b) & (c)) apply to all lawyers and are therefore, not discriminatory.

In the second place, it seems to me that the object is to ensure that the management of the Bar is in the hands of the senior members of the profession. This provision is consistent with other provisions of the Act (ss. 13 & 99) also requiring 7 years standing. The provision

for senior members of a profession to oversee other members is not unknown to the law see e.g. the Architects Act 1967, where only architects with not less than three years in private practice can be appointed to the Board of Architects: s. 3(1)(d). Imposing disqualifications on the same body of men does not make the law discriminatory.

As a consequence of the disqualification, lawyers can be said to be divided into classes of senior lawyers and junior lawyers. But is such a classification in the circumstances of this case unreasonable? I think it is quite clear that the only object of the legislation (as can be discerned from the provision itself) is that senior lawyers should oversee the affairs of the profession. In practice, the management of the affairs of the Bar is organised on a three-tier structure as follows -

(a) The Bar Council (s. 47) with powers over the entire Bar (s. 56 & 57);

(b) State Bar Committees with powers over members of the Bar within the State only (s. 73);

(c) Committees appointed by the Bar Council under s. 58 (there are 17 such committees) with functions ranging from legislation to sports and welfare.

In my opinion the powers and functions of the Bar Council and State Bar Committees as provided by the Act must clearly be exercised by senior members of the profession and the disqualification from membership of these bodies by junior lawyers is not unreasonable. S. 46A(1), however also applies to-

any committee of the Bar Council or a Bar Committee.

In my view this part of the provision has gone more than somewhat a little too far and is unreasonable for the following reasons-

(a) There is adequate protection against usurpation or abuse of powers by a Committee under sub-section 4 of s. 58 which reads-

The Bar Council shall not delegate to a committee appointed under this section any of its functions unless at least two thirds of the members of the committee (including the chairman thereof) are members of the Council.;

(b) The committees generally do the ground-work and make recommendations to the Bar Council or State Bar Committee for adoption and implementation;

(c) It is unreasonable to expect senior members of the Bar to take an active part in, say, the sports committee;

(d) The number of lawyers required to serve in these committees is very large and imposes a severe strain on senior lawyers.

It does not follow that the entire provision of s. 46A(1) is bad. Applying the doctrine of severability, the bad can be severed from the good.

I accordingly hold that the words

"or of any committee of the Bar Council or a Bar Committee"

appearing in s. 46A(1) for the Legal Profession Act in so far as it affects para. (a) thereof is *ultra vires* Article 8(1) and is therefore void under Article 4(1) of the Federal Constitution but the remaining provisions are not *ultra vires* or void under the Federal Constitution.

As regards the second declaration sought I find no merit in the argument that the amendment is in violation of Article 10(1)(c) of the Federal Constitution in that it violates the rights of citizens to form associations. Firstly only lawyers can become members of the Malaysian Bar.

Secondly, every lawyer is automatically a member of the Bar (s. 43 of the Act). He continues membership so long as he holds a valid practising certificate. Nowhere in s. 46A is there a provision to prevent a lawyer from being a member of the Bar. The question of freedom of association therefore does not arise.

It is contended that the amendment has brought a change in the composition of the Bar Council and therefore the right of association has been violated. There is no merit in this argument either because Article 10(1)(c) does not give any right to any citizen to manage any association but merely the right to form associations: *Azeez Basha v. Union of India* [1968] AIR SC 662 at p. 675. I accordingly find that s. 46A(1)(a) is not *ultra vires* Article 10(1)(c) and therefore not void under Article 4(1) of the Federal Constitution.

There will be no order as to costs.

Also found at [1986] 2 CLJ 343